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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

8 UNITED STATES OF AMERICA,)
9 Plaintiff,) Case No. 2:17-cr-00392-JCM-NJK
10 vs.)
11 EDGAR LIMON,) ORDER
12 Defendant.) (Docket No. 23)

13 Presently before the Court is Defendant's sealed *ex parte* motion for issuance of a Rule 17
14 subpoena. Docket No. 23.¹

15 **I. BACKGROUND**

16 Defendant asks the Court to issue a subpoena to the Clark County District Attorney's Office,
17 directing it to produce either the original Request for Prosecution form for Edgar Limon in case
18 number 17F20485X or, if it has been destroyed, a certificate of non-existence. *Id.* at 4. Additionally,
19 Defendant asks the Court to issue a subpoena to the Las Vegas Justice Court for any and all filings,
20 records, and reports relating to case number 17F19562X. *Id.* at 3.

21 **II. ANALYSIS**

22 The issuance of subpoenas in criminal cases is governed by Federal Rule of Criminal
23 Procedure 17. Rule 17(b) sets forth the procedure for defendants who cannot pay the requisite
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25 ¹Although Defendant filed his motion *ex parte* and under seal, the Court does not seal this
26 order or issue it *ex parte*. Defendant submits that he has already received copies of the requested
27 documents from the United States, but found them illegible. Defendant further submits that he asked
28 the United States to inspect the original documents, but the United States did not have them in its
possession, necessitating the instant motion. As a result, Defendant has submitted no information
that is unknown to the United States or should otherwise remain under seal.

1 witness fees and permits a defendant to submit an *ex parte* application requesting that a court issue
2 a subpoena. A court will permit issuance of a subpoena to a named witness “if the defendant shows
3 an inability to pay the witness’s fees and the necessity of the witness’s presence for an adequate
4 defense.” Fed. R. Crim. P. 17(b). “Although prior judicial authorization is required, the *ex parte*
5 nature of a Rule 17(b) application serves to put a defendant on an equal footing with the Government
6 because the Government is not required to give a defendant notice as to those witnesses that it
7 intends to subpoena to testify at trial.” *United States v. Sellers*, 275 F.R.D. 620, 622 (D. Nev. 2011)
8 (citation and internal quotation marks omitted).

9 Federal Rule of Criminal Procedure 17(c) describes the process by which a court can issue
10 a subpoena *duces tecum* for the production of evidence before trial. Rule 17(c)(1) governs the
11 production of documents and objects. It provides:

12 A subpoena may order the witness to produce any books, papers, documents, data,
13 or other objects the subpoena designates. The Court may direct the witness to
14 produce the designated items in court before trial or before they are to be offered in
evidence. When the items arrive, the court may permit the parties and their attorneys
to inspect all or part of them.

15 Unlike a subpoena issued under Rule 17(a) or 17(b) to compel a witness to appear at trial,
16 subpoenas *duces tecum* may, within a court’s discretion, be made returnable before trial. Rule 17
17 is not, however, a discovery device. *See, e.g., Sellers*, 275 F.R.D. at 622-23 (collecting cases).
18 Nevertheless, Rule 17(c) may be used to obtain evidentiary materials. *See, e.g., id.* at 623 (citing
19 cases). Rule 17(c)(1) permits a party to subpoena a witness and require him to report only at either
20 a trial or hearing at which he is to testify. *See, e.g., id.* (collecting cases).

21 A party must obtain leave of court for a subpoena *duces tecum*, and various courts have held
22 that a court may, in its discretion, require production of documents prior to trial. *See, e.g., id.*
23 (citations omitted). The Supreme Court has stated that:

24 Enforcement of a pretrial subpoena *duces tecum* must necessarily be committed to
25 the sound discretion of the trial court since the necessity for the subpoena most often
26 turns upon a determination of factual issues. Without a determination of arbitrariness
or that the trial court finding was without record support, an appellate court will not
ordinarily disturb a finding that the applicant for a subpoena complied with Rule
17(c).

1 *United States v. Nixon*, 418 U.S. 683, 702 (1974).

2 The party seeking production bears the burden of showing good cause for production before
3 trial. *See Sellers*, 275 F.R.D. at 623 (citation omitted). In *United States v. Iozia*, 13 F.R.D. 335, 338
4 (D.C.N.Y. 1952), the court established a standard that many other courts have since adopted. *See*
5 *Sellers*, 275 F.R.D. at 623 (collecting cases). The *Iozia* test requires that, to demonstrate good cause
6 for the issuance of a Rule 17 subpoena, a movant must show:

7 (1) That the documents are evidentiary and relevant;

8 (2) That they are not otherwise procurable by the defendant reasonably in advance
9 of trial by exercise of due diligence;

10 (3) That the defendant cannot properly prepare for trial without such production and
11 inspection in advance of trial and the failure to obtain such inspection may tend
12 unreasonably to delay the trial; and

13 (4) That the application is made in good faith and is not a general fishing expedition.

14 *Sellers*, 275 F.R.D. at 623.

15 The party seeking pretrial production bears the burden of establishing specificity, relevancy,
16 and admissibility. *Nixon*, 418 U.S. at 700. Thus, the party seeking pretrial production must “show
17 the evidentiary nature of the requested materials with appropriate specificity.” *Sellers*, 275 F.R.D.
18 at 623. The specificity requirement is designed to prevent a party from using a subpoena *duces*
19 *tecum* as a “fishing expedition to see what may turn up.” *Bowman Dairy Co. v. United States*, 341
20 U.S. 214, 220 (1951). Conclusory allegations of relevance and admissibility are insufficient. *United*
21 *States v. Eden*, 659 F.2d 1376 (9th Cir. 1981). Rather, the moving party must show that there is a
22 sufficient likelihood that the requested material is relevant to the offenses charged in the indictment,
23 and that the requested material contains admissible evidence regarding the offenses charged. *Nixon*,
418 U.S. at 700.

24 Here, Defendant makes no attempt to meet the Iozia standard for the document requested from
25 the Clark County District Attorney’s Office. *See* Docket No. 23. Further, regarding the documents
26 sought from Las Vegas Justice Court, Defendant submits a conclusory statement without failing to
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1 address all *Iloza* factors. As one example, Defendant fails to submit that the documents are not
2 otherwise procurable by exercise of due diligence, as it appears Defendant has failed to even attempt
3 to contact Las Vegas Justice Court. Docket No. 23 at 3.

4 Accordingly,

5 **IT IS ORDERED** that Defendant's *ex parte* motion for subpoenas, Docket No. 23, is hereby
6 **DENIED** without prejudice.

7 IT IS SO ORDERED.

8 DATED: April 10, 2018.

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12 NANCY J. KORPE
13 United States Magistrate Judge
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